

**APPLICATION FOR JUDGESHIP**

4<sup>th</sup> Judicial District 2006

**A. PERSONAL INFORMATION**

1. Full Name: **Karen Sue Townsend**
  - a. What do you commonly go by: **Karen S. Townsend**
2. Birthdate: **May 14, 1942** Are you a U.S. citizen? **Yes**
3. Social Security No.
4. Home Address:
5. Office Address: **200 West Broadway**  
**Missoula, Montana, 59802** Phone: **406-258-4737**
6. Length of residence in Montana: **35 years**
7. List your place of residence for the past five years:

Dates

City

State

**Since August, 1973**

**Missoula**

**Montana**

## B. EDUCATIONAL BACKGROUND

8. List the names and location of schools attended, beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
1956-1960: Old Trail School,	Akron, Ohio 9-12	June, 1960	diploma
1960-1964: Ohio Wesleyan University,	Delaware, Ohio BA	June, 1964	BA degree
1964-1965: University of California,	Berkeley CA, MA	August, 1965	MA degree
1965-1970: University of Hawaii,	Honolulu, HI, miscellaneous courses, no degree		
1971-1972: Montana State University,	Bozeman, MT, miscellaneous courses, no degree		
1973-1976: University of Montana,	Missoula, MT,	June, 1976	JD degree

9. List scholarships, awards, honors and citations you have received (Eagle Scout, Book Awards, Boy's or Girl's State, etc.)

**Fellow, American College of Trial Lawyers**

**Outstanding Lawyer, Western Montana Bar Association 1994**

**YWCA Salute to Excellence Winner in Public Service 1996**

**Honor graduate, University of Montana School of Law**

**Member, Montana Law Review**

**Outstanding Student Bar Member, University of Montana School of Law (1975-76)**

**Graduate of the Year Phi Delta Phi for University of Montana and Northwest Regional Winner 1976**

**Member of Psychology, Journalism and Education honorary societies while an undergraduate at Ohio Wesleyan University and a graduate student at the University of California**

**Distinguished service awards from National College of District Attorneys and from Big Brothers and Sisters of Missoula, St. Patrick Hospital**

**Selected as Faculty Advisor for the 1980 Career Prosecutor Course presented by the National College of District Attorneys--one of 14 prosecutors from around the country so selected**

10. Were you a member of the Law Review Board? If so, please state the title and citation of any article which was published and the subject area of the article.

**Yes, at the University of Montana School of Law. Member 1974-1976; Editorial Board 1975-1976.**

**“Stanley vs. Illinois: What It Portends for Adoptions in Montana” Montana Law Review, Volume 63, winter 1975 Number 1.**

**“Due Process Rights and High School Suspensions After Goss v. Lopez” Montana Law Review, Volume 37, winter, 1976, Number 1.**

**“The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems” Montana Law Review, Volume 37, winter, 1976, Number 1.**

**C. PROFESSIONAL BACKGROUND AND EXPERIENCE**

11. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
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<b>Montana</b>	<b>June 14, 1976</b>
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<b>United States District Court (Montana)</b>	<b>June 14, 1976</b>
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<b>United States Supreme Court</b>	<b>March 17, 1980</b>
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12. Indicate your present employment (list professional partners or associates, if any).

**I am currently the Chief Deputy County Attorney for Missoula County. The attorneys that I practice with are: Fred Van Valkenburg, County Attorney, in the Criminal Division of that office are: Dori Brownlow, Suzy-Boylan Moore, Kirsten LaCroix, Andrew Paul, Jennifer Clark, Dale Mrkich, Michelle Burton and Patricia Bower. In the Civil Divison are Michael Sehestedt (Chief Civil Deputy), Martha McClain, Colleen Dowdall, Diane Conner, Leslie Halligan.**

13. State the name, dates and addresses of all law firms with which you have been associated in practice, and of all governmental agencies or

private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
<b>Missoula County Attorney's Office 200 West Broadway Missoula, MT 59802</b>	<b>Deputy County Attorney</b>	<b>7/76-8/80</b>
<b>County Prosecutor Services Bureau Montana Department of Justice 215 N. Sanders Helena, MT 59620</b>	<b>Chief Staff Attorney</b>	<b>8/80-12/81</b>
<b>Missoula County Attorney's Office 200 West Broadway Missoula, MT 59802</b>	<b>Deputy County Attorney</b>	<b>1/81-1/88</b>
<b>US Attorney's Office P. O. Box 1478 Billings, MT 59103</b>	<b>Special Assistant US Attorney</b>	<b>1984-1988</b>
<b>National College of District Attorneys Then located at University of Houston Law Center—Houston, TX Now at University of South Carolina Plaza 937 Assembly Street Columbia, SC 29208</b>	<b>Director of Training</b>	<b>2/88-6/90</b>
<b>Missoula County Attorney's Office 200 West Broadway Missoula, MT 59802</b>	<b>Deputy County Attorney</b>	<b>7/90-11/98</b>
<b>US Attorney's Office P. O. Box 1478 Billings, MT 59103</b>	<b>Special Assistant US Attorney</b>	<b>9/90-present</b>
<b>Missoula County Attorney's Office 200 West Broadway Missoula, MT 59802</b>	<b>Chief Deputy County Attorney</b>	<b>11/98-present</b>

14. If you have not been employed continuously since the completion of your formal education, describe what you were doing.

**I took a brief period of time after completion of my MA degree when my husband and I moved to Hawaii for him to attend graduate school. Between September of 1965 to the end of January of 1966 I did not work and I had our son. Other than that, I have been continuously employed.**

15. Describe the nature of your present law practice, listing the major types of law you practice and the percentage each constitutes of your total practice.

**As the Chief Deputy County Attorney for the criminal division of the Missoula County Attorney's office, I am primarily a criminal prosecutor. I carry a regular caseload and therefore represent the State of Montana in my share of the criminal cases filed in Missoula County. I must make the charging decisions for those cases, and then if a case is charged, be responsible for the case until it is over. That means making most of the necessary court appearances, handling any pre-trial matters or motions, writing the necessary briefs, attempting to negotiate a settlement without trial, and if that fails, handling a jury or non-jury trial in the case. If the defendant is convicted, I will appear in court for the sentencing hearing, assist the Attorney General's office with any appeal, handle any sentence review hearings, probation violations, post-conviction or habeas corpus matters. The types of cases can range from simple traffic offenses to homicide cases. In addition, I have supervisory responsibilities for the other criminal prosecutors in the office. I assign them cases, conduct performance evaluations, offer advice and provide training. I also participate with the County Attorney in hiring and promotion decisions. Criminal law constitutes close to 90% of my practice, with civil law being about 10%.**

**Prior to assuming the duties of Chief Deputy County Attorney, most of my work in the County Attorney's office during each of the three time periods that I have worked there was similar to that described above. However, during my first years of employment there, I was assigned to the civil side of the office, and as such represented the Health Department and the local school boards primarily in contract matters and personnel matters. Over the years I have also handled both criminal and civil juvenile matters for the office and involuntary commitments.**

16. List other areas of law in which you have practiced, including teaching, lobbying, etc.

When I served as Chief Staff Attorney for the Montana Department of Justice, I performed similar functions as that of a Deputy County Attorney when our office was invited to assist with a criminal prosecution by county officials. During the time that I was there, I was assigned to matters in Garfield, Jefferson, Powell, Ravalli, Silver Bow and Teton counties. In addition, I did research for prosecutors throughout the state, assisted in planning training programs for the Montana County Attorney's Association, and helped during legislative sessions with information for legislators.

As Director of Training for the National College of District Attorneys, I was responsible for planning and conducting continuing legal education programs for prosecutors around the country. The majority of the programs were national programs, usually a week long in some aspect of criminal law (e.g. Trial Advocacy, Prosecution of Child Sexual Assault cases, or Prosecution of Drug Cases). However, some programs were for state associations (like the Montana County Attorney's Association), and I did have responsibility for the Government Civil Practice program each year I was there. Planning the course involved choosing the particular topics and speakers, reviewing the written materials submitted by the speakers, and traveling to the site to run the course. I also assisted in writing several scenarios, which are still used today in performance portions of trial advocacy courses.

On a handful of occasions, I have served as an expert witness for some civil cases when the matter involved criminal issues. The majority of the times, the issue has been one of search and seizure, but I have also been asked to review charging decisions, appropriateness of arrests, discovery issues, etc.

17. If you specialize in any field of law, what is your specialty?

**Criminal Law**

18. Do you regularly appear in court? Yes

What percentage of your appearance in the past five years were in:

Federal Court	<u>5</u>	%
State or local courts of record	<u>70</u>	%
Administrative bodies	<u>0</u>	%
Other	<u>25</u>	%

19. During the past five years, what percentage of your practice has been trial practice? 90%
20. How frequently have you appeared in court? 20 times per month on average.
21. How frequently have you appeared at administrative hearings? 0 times per month on average.
22. What percentage of your practice involving litigation has been:

Civil	<u>10</u>	%
Criminal	<u>90</u>	%
Other	<u>0</u>	%

23. Have you appeared before the Montana Supreme Court within the past five years? If so, please state the number and types of matters handled. Include the case caption, case citation (if any), and names addresses and phone numbers of all opposing counsel for the five most recent cases.

**Although I have not personally appeared before the Montana Supreme Court within the past five years, I have had the following cases that were appealed after convictions in which I served as primary counsel. Four appeals are currently pending.**

**One case had two separate opinions: State v. Kenneth Snell, 2004 MT 269, 323 Mont. 157, 99 P.3d 191, and State v. Kenneth Snell, 2004 MT 334, 323 Mont. 272, 193 P.3d 503. Opposing counsel was the Criminal Defense Clinic at the University of Montana School of Law, Jeff Renz Director 406-243-4311**

**A second decided case is State v. Tony Byers, 2003 MT 83, 315 Mont. 89, 67 P.3d 880. Opposing counsel was Margaret Borg, Chief Missoula County Public Defender, 317 Woody Street, Missoula, Montana 406-258-4865**

**Two of the cases that are currently pending are both entitled State of Montana vs. Randall Woods, one is Supreme Court Number 05-564 and the other is 05-683 Opposing counsel is Brian Smith of the Missoula County Public Defender's Office, 317 Woody Street, Missoula, Montana, 59802, 406-258-4865**

**One other case pending on appeal before the Montana Supreme Court is State of Montana vs. William Paul Auld, 04-613. Appellate counsel for the Defendant is Chad Wright, Appellate Defender's Office, P. O. Box 20014 Helena MT 59620.**

**The final case that is on appeal is State of Montana vs. Karl Pulliam, 04-78, Counsel for the appeal is Margaret Borg, Chief Missoula County Public Defender, 317 Woody Street, Missoula, MT 59802, 406-258-4865.**

24. State the number of jury trials you have tried to conclusion in the past ten years. **25**

25. State the number of non-jury trials you have tried in the past ten years. **I do not know. Most of my trials have been jury trials. However, I have done frequent probation violation hearings which may count as non jury trials, and have litigated post conviction relief cases which would also count as non-jury trials since evidence is presented, but I cannot track all of those cases down. I have probably tried a half dozen JP non-jury trials each year over the last ten years.**

26. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

Name of Case	Dates of Trial	Name, Telephone number of Presiding Judge	Name, address and telephone number of defense counsel
<u>State v. William Paul Auld</u> DC-03-325	2/11/04-2/13/04	John S. Henson 406-258-2772	Colleen Ambrose, at the time with the Missoula County Public Defender's Office, now with the Montana Department of Corrections, P.O. Box 201301 Helena, MT 59620-1301, 406-444-9894.
<u>State v. Randall Leroy Wood</u> : DC 04-302	11/18/04-11/19/04	Douglas G. Harkin, 406-258-4774	Brian Smith, Missoula County Public Defender's Office, 317 Woody Street, Missoula, MT 406-258-4625
<u>State v. Robert Herbig</u> , DC 04-189	1/4/05	Ed McLean, 406-258-4771	Lance Jasper, 207 West Front Street, Suite A, Missoula, MT 59802, 406-542-3330
<u>State v. Randall Leroy Wood</u> , DC 04-335	2/2/05-2/3/05	Douglas G. Harkin, 406-258-4774	Brian Smith, Missoula County Public Defender's Office, 317 Woody Street,



			Missoula, MT 406-258-4625
<u>State v. Donald Paul Rogers</u> , DC-04-78	6/1/05-6/2/05	John S. Henson, 406-258-4772	Robin Ammons and Richard Buley, 2200 Brooks, Missoula, MT 59801, 406-549-5816
<u>State v. Karl Pulliam</u> , DC-04-78	8/3/05-8/4/05	John S. Henson, 406-258-4772	Margaret Borg, Missoula County Public Defender's Office, 317 Woody Street, Missoula, MT 406-258-4625
<u>State v. Randy Lee Plumley</u> , DC 05-192	9/28/05-9/29/05	John S. Larson 406-258-4773	Scott Spencer, Missoula County Public Defender's Office, 317 Woody Street, Missoula, MT 406-258-4625
<u>State v. Sean O'Toole</u> , DC 04-518	10/25/05-10/27/05	Ed McLean, 406-258-4771	Lisa Kauffman, 1234 S 5 <sup>th</sup> West, Missoula, MT 59801, 406-542-2726
<u>State v. Wilbert Fish</u> , DC-05-145	1/27/05-1/31/05	John S. Larson 406-258-4773	Morgan Modine, 215 West Broadway, Missoula, MT 59802, 406-542-1111
<u>State v. Johnnie</u>	2/13/05, 2/15/05	Douglas G.	Martin Judnich

Ray Ulrigg, DC-04-366 Notice of Appeal filed		Harkin, 406-258-4774	P. O. Box 9303 Missoula, MT 59807, 406-721-3354
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27. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

None

28. If you have published any legal books or articles, other than Law Review articles, please list them, giving citations, dates, and the topics involved. If you lectured on legal issues at Continuing Legal Education seminars or otherwise, please state the date, topic and group to which you spoke.

**“Mental Health Experts and Opening Statements” Analytical Trial Advocacy: A Practical Approach for Prosecutors National College of District Attorneys, 1996**

I have taught trial advocacy for more than twenty years. I have taught prosecutors and interns at the Missoula County Attorney’s Office and through the National College of District Attorneys in a variety of trial advocacy programs. I have taught as an adjunct professor at the UM Law School in their trial advocacy program. I have frequently been called upon by the law school to judge student performance in trial work or in preparation for national competitions. I spent 6 years on the faculty of the Advanced Trial Advocacy Program have served as the Director of that Program for the last three years. I have co-written the scenario that has been used in that program the last two years and will be used again this year. I have served as co-coach of the ATLA student Trial Team for seven years. All of these programs focus on civil trial problems. While at the National College of District Attorneys, I helped to write four scenarios that are still used in the Trial Advocacy training programs given at the National Advocacy Center.

I have prepared two outlines, one on Search and Seizure in Montana and the other on Sexual Assault Prosecutions in Montana. Although these outlines have not been published in a book or law review article, they have been widely distributed to district judges and law clerks in Montana as well as to all County Attorneys in the state and the most recent versions are currently on the County Attorney’s Association Website. Further, the Search and Seizure outline has been used as a teaching tool for programs offered to the Courts of Limited Jurisdiction, and distributed to all of the JP’s in the state. I have been invited to lecture to the Courts of Limited Jurisdiction on the area of Search and Seizure several times, and have been again invited to teach that subject at their certification course this fall. Two years ago, I was invited to present on the area of Search and Seizure to the National Organization for Lower Court Judges. This presentation focused on United States Supreme Court cases on Search and Seizure. Finally, each year for the last ten or so years, I have taught the Montana Criminal Law section for the Bar-Bri course that tries to prepare graduating law students for Montana’s bar exam.

**In addition, I have prepared outlines for CLE presentations both in Montana and for national courses sponsored by the National College of District Attorneys and the National Law Enforcement Training Center. Those outlines were on the following topics:**

**Eye Witness Identification Problems: December 1985, for the Montana County Attorney's Association**

**Jury Selection: September 1990, for the National College of District Attorneys**

**Child Sexual Abuse Cases in Montana, Special Considerations, July 1991 for the National Center for Prosecution of Child Abuse**

**Meeting Defenses in Drug Cases, May, 1992 for the National College of District Attorneys**

**Reviewing Reversible Error Situations, February, 1993 for the National College of District Attorneys**

**Arson Prosecution, A case Study April 1993, for the Federal Law Enforcement Training Center**

**Trial Notebooks, July 2001 for the National Advocacy Center in Columbia South Carolina**

**Search and Seizure Update for the Montana County Attorney's Summer Conference in Polson in July of 2003.**

**Case Analysis, 2003 for the National Advocacy Center in Columbia South Carolina**

**Ethical Pitfalls for Prosecutors in trials, 2003 for the National Advocacy Center in Columbia South Carolina and for the Montana County Attorney's Summer Conference in 2004.**

#### **D. PROFESSIONAL AND PUBLIC SERVICE**

29. List all the bar associations and legal professional societies of which you are a member and give the titles and dates of any office you have held in such groups, and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

**Fellow, American College of Trial Lawyers—Inducted in 2000, State Committee Member 2001-present, State Chair, 2002-2004, Member of Federal Criminal Rules Committee, Admission to Fellowship Committee, and the National College of District Attorneys Committee**

**American Bar Association**

**National District Attorney's Association**

**State Bar of Montana—Former Director of Women's Law Section, 2001 Annual Meeting Committee**

**Western Montana Bar Association—Director 1995-1999**

**Member Montana Criminal Jury Instruction Commission—present**

**Founding Member of Women's Law Caucus**

30. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the past five years. Please state the title and date of any office you have held in each such organization. If you held any offices, please describe briefly your activities in the organization.

**Advisory Board: St. Patrick Hospital 1997-2002, Chair 2001-2002**

**The Advisory Board was designed to give advice and feedback to the executive staff and the governing board of the hospital and to act as a liaison between the community and the hospital in helping the hospital present its goals and its mission to the Missoula citizens and finding out how the community reacted to those plans.**

**Foundation Board of St. Patrick Hospital and Health Sciences Foundation: 2002-present**

**The Foundation Board raises money to assist the hospital in carrying out its mission. Currently the Board is engaged in a major capital campaign to raise funds for the Montana Cardiac Telemedicine Network that seeks to connect distant communities and hospitals to St Pats so that diagnosis of cardiac problems is improved. The Foundation is also the primary sponsor for St Patrick House that serves as a place for families who have loved ones in the hospital to stay.**

**Member Board of Directors of Missoula Correctional Services**

**Missoula Correctional Services is a non-profit corporation that operates the Missoula Pre-Release Center, the Missoula Misdemeanor Supervision Program, and the Missoula Community Service Program. The Board supervises the Executive Director, approves the budget, and sets policy for the organization.**

**Kiwanis Club of Missoula—Vice President, President Elect and President, 1994-1997, Lt. Governor Division One for Montana District of Kiwanis, 1999-2000. Kiwanis is an organization that focuses on serving the children of our community and the world.**

**Big Brothers and Sisters of Missoula, Board of Directors: 1977-1980, 1982-1988:**

**President of the Board: 1982-1984, currently member of Capital Campaign**

**Breast Cancer Resource Network: Founding President 1991. This organization grew out of the support group I joined after being diagnosed with breast cancer. Our group decided that others experiencing some of the same problems that we had experienced needed a central resource to access to answer questions about the diagnosis, treatment and recovery.**

**Reach for Recovery Volunteer**

**Leadership Missoula 1997**

**Founding Chair of Missoula County Child Sexual Assault Council. This organization was founded to try to streamline the process for children who were victims of sexual assault and to lobby for laws that would lead to more efficient and effective prosecution of offenders.**

**Member: Family Violence Council**

31. Have you ever run for, or held, public office? If so please give the details.

**I have never run for a public office. However, the position of Deputy County Attorney and Chief Deputy County Attorney and Special Assistant United States Attorney are public offices, although they are secured by appointment.**

**I have been a candidate on three separate occasions for a state judicial office. First, in the fall of 1988 for Department 1 of the Fourth Judicial District; second, in 1993, for Department 3 of the Fourth Judicial District; third, in 1995, for the Montana Supreme Court. I also applied to Senator Baucus' screening committee when for the Federal District Judge position when Judge Molloy was nominated. I have also been through the screening committee for the most recent Federal Magistrate vacancies, receiving an interview from the Committee for the position that went to Judge Carolyn Ostby and most recently for the position that went to Jerry Lynch.**

**I was a Member of the Montana Human Rights Commission. I served from 1977-1981. I served as a Member from 1977 to 1979 and as Chair of the Commission from 1979-1981.**

**E. HEALTH RECORD**

32. Do you have any disabilities or impairments that might interfere with your performance of the duties of a judge? If so, please explain.

**My health is excellent. I do wear eyeglasses for reading. I have had laser surgery on one eye.**

**In 1990, I was diagnosed and then treated for breast cancer. I had a lumpectomy, followed by a removal of lymph nodes that showed no spread of the cancer. I was treated by radiation and chemotherapy from February through October of 1991. In August 1991, I was hospitalized with a blood clot, exact cause unknown, but which may have been related to the chemo. I have been monitored regularly since then, with no signs of recurrence. I do not think that either of these conditions should impact service as a judge.**

**F. PROFESSIONAL CONDUCT AND ETHICS**

33. Have you ever been disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, give the particulars.

**No**

34. Do you know if any proceeding is pending against you before any court, the Commission on Practice of the State of Montana, Judicial Standards Commission, or by any administrative agency or disciplinary committee? If so, give the particulars.

**I have no knowledge of any pending proceeding. There have been a couple of complaints made to the Commission or the Office of Disciplinary Counsel relating to my work in the County Attorney's Office in the past, but after I responded to the initial inquiry, no further action was taken on the complaint. In both cases, the complaints involved allegations of failing to properly supervise one of the other deputy county attorneys in the office who actually prosecuted the defendant's case.**

35. Have you ever been found guilty of contempt of court, or sanctioned by any court for any reason? If so, please explain.

**No.**

36. Do you disagree with any of the Canons of Judicial Ethics applicable to Montana Judges? If so, please explain.

**No.**

37. Have you ever been arrested or convicted of a violation of any federal law, state law, county or municipal law, regulation or ordinance? If so, please give details. Do not include traffic violations for which a fine of \$100 or less was imposed unless it also included a jail sentence.

**No.**

38. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, please give the particulars, including the amounts involved.

**No.**

39. Have you ever been found guilty in any civil or criminal proceedings with conduct alleged to have involve moral turpitude, dishonesty and/or unethical conduct? If so, please give details.

**No.**

40. Is there any circumstance or event in your personal or professional life which, if brought to the attention of the Commission, the Governor or the Montana Supreme Court, that would affect adversely

your qualifications to serve on the court for which you have applied? If so, please explain.

**No.**

**G. BUSINESS AND FINANCIAL INFORMATION**

41. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, please give details, including dates.

**No.**

42. If you are an officer, director, or otherwise engaged in the management of any business, please state the name of such business, its nature, and the nature of your duties. State whether you intend to resign such position immediately upon your appointment to a judicial office.

**I am a member of the Board of Directors of Missoula Correctional Services Inc. Missoula Correctional Services Inc. is a private non-profit corporation that operates the Missoula Pre-Release Center, the Missoula Misdemeanor Supervision Program, and the Missoula Community Service Program. The Board supervises the executive director, approves all policies, the budget, and any contracts. I would resign from this Board if appointed. I am also a member of the St. Patrick Hospital and Health Sciences Foundation Board whose mission is to raise funds for St Pat's. We have supervisory responsibility over the Director of the Foundation and also approve policies and budget. I would also expect to resign if appointed.**

43. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization, If so, please identify the source and the approximate percentage of your total income it constituted over the past five years.

**In each of the last five years, I have received a small fee from Bar-Bri for reviewing and revising the Montana Criminal Law and Procedure Outline and then for presenting the Montana Criminal Law lecture.**

**I have also received a faculty fee from the National District Attorney's Association for teaching at the National Advocacy Center on four occasions in the last five years.**

**I have received a fee for serving as Director of the Advanced Trial Advocacy Program from the UM Law School during each of the last three years.**

**I have received payment for services rendered as an expert witness in one lawsuit that has now settled. Currently I am serving as an expert witness in another case that is still pending. I have not yet received any payment, but have contracted for payment in the amount of \$150.00 per hour of my time.**

**The totals of all of these payments amount to about 5% of my income.**

**I own stock in the following corporations and receive dividend payments four times per year. BP PLC, Bellsouth, Coca Cola, Duke Energy, Exxon Mobil, FPL Group, FirstMerit, Fluor Corp, Glacier Bancorp Inc, Home Depot, Massey Energy Company, Procter & Gamble Co, Daimler Chrysler AG, Smucker Company. I also own the following municipal bonds and receive regular interest payments. Key West FL, University of Montana, Billings Montana Storm SWR, Montana St Higher Education Student Assist, City of Missoula Gen Obligation Bonds, Cascade Cnty Mont Gen Obligation, University Mont. Univ Revs Facs Acquisition & Impt Ser C, Forsyth Mont PCR Ref Ser, I have 4 US Treasury Notes, and Government National Mtg Assn Pool No 272858 bonds. I have shares in the following Mutual Funds. Templeton Foreign FD CI A, Fidelity Advisor Ser 1 Equity Port Growth Instl CI, Fidelity Advisor Equity Inc I, Franklin Small Cap Fund CI A. My husband and I jointly own shares in 2 Vanguard Mutual Funds. I have an IRA through DADavidson.**

**The dividend and interest payments amount to not quite 20% of my income.**

44. Do you have any financial interests, investments or retainers which might conflict with the performance of your judicial duties, or which in any manner or for any reason might embarrass you? If so, please explain.

**No.**

45. Have you filed appropriate tax returns as required by federal, state, local and other government authorities? \_\_\_\_Yes X\_\_\_\_No

If not, Please explain.

**Somewhere between 1965-1971, my husband and I as a war protest did not pay the amount we owed beyond the amount of money that was withheld on our federal income tax return. The Federal Government executed against our bank account to collect the amount owed and the penalty and interest. The amount we protested was, I believe, less than \$250.00-\$500.00. We did this only once, but the exact year I cannot remember.**

46. Do you have any liens or claims outstanding against you by the internal Revenue Service? \_\_\_\_Yes X\_\_\_\_No

If yes, please explain.



47. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five (5) years? If so, please give details.

**No.**

48. Please explain your philosophy of public involvement and practice of giving your time to community service.

**Although I consider that I have worked hard during my life, I also realize that I have been the beneficiary of a number of advantages that others do not have—intelligence, a good family, the opportunity to attend good schools and get an education, and sufficient financial resources to provide for our needs and many of our “wants.” My family taught me and I have always believed that if you are fortunate enough to have those advantages, it is your obligation to give to others who are less fortunate. Sometimes that giving back comes in the form of monetary contributions, but it also comes in the form of giving your time and talent. I heard a speaker tell the members of one of the Boards I have served on that a Board Member has to donate time, talent and treasure. I think that sums up my philosophy of public involvement and community service. It is often easy to donate money, write a check and that is the last that you have to think about the organization. What often is more precious for busy individuals is time. So, I have attempted to fulfill that obligation by not only donating to worthy causes, but also volunteering my time to organizations like Big Brothers and Sisters, the YWCA, the State Bar and the Western Montana Bar Association, the Law School, Reach for Recovery, St Patrick Hospital and Health Sciences Center, Missoula Correctional Services, and the Kiwanis Club of Missoula. This volunteer time involves me with kids, with law students, with cancer victims, and with health care.**

#### **H. WRITING SKILLS**

49. In the last five years, explain the extent you have researched legal issues and drafted briefs. Please state if associates or others have generally performed your research and the writing of briefs.

**I am primarily responsible for researching and writing the legal briefs that have been filed in my cases over the last five years as well as before that. Although our office does employ legal interns that have occasionally prepared these responses for me, almost all of the work has been my own.**

50. If you have engaged in any other types of “legal writing” in the last five years, such as drafting documents, etc., please explain the type and extent of writing you have done.

**As a deputy county attorney I am responsible for drafting all of the Complaints charging a criminal offense that I file, all of the Affidavits of Probable Cause that are submitted in support of the Complaint, all of the Informations and the Affidavit in Support of a Motion for Leave to File an Information, any motions, and frequently Investigative Subpoenas.**

51. Please attach a writing sample of no more than ten pages which you have written yourself. A portion of a brief or memorandum is acceptable.

**Please see the attachment.**

52. What percentage of your practice for the last five years has involved research and legal writing? **Since I do all my own drafting it amounts to almost 100%.**

53. Are you competent in the use of Westlaw and/or Lexis?

**Yes in both. We used to use WestLaw in the office, now we use Lexis.**

#### **I. MISCELLANEOUS**

54. Briefly describe your hobbies and other interest and activities.

**I love to read, and read all kinds of materials. I love to travel and during the travel attempt to learn about the culture and the people who are there and the surrounding environment. I thoroughly enjoy walking and exploring new country, as well as deepening my appreciation for the area right around where we live. We have a sailboat and I enjoy sailing, both on our boat and on a larger boat of our friends where we have explored over the years the waters and islands around Vancouver Island and the British Columbia Coast and Southeast Alaska. I dabble as a cross-country skier.**

55. Describe the jobs you have held during your lifetime:

**Other than my work in the legal field that has been described elsewhere, I have worked in the following jobs. I worked as a bank teller during the summers when I was in college. During graduate school, I worked as a graduate resident in the dormitory at the University of California. This job required you to offer counseling and assistance to the undergraduates who lived in the dorm, and also to enforce the dormitory policies. Also during graduate school, I held a work-study job working with early computer research that meant entering data on punch cards. After completing my MA degree and moving to Hawaii, I taught high school at Farrington High School in Honolulu for two and one-half years. I then served as a high school counselor at the same high school for the next three years. After moving to Bozeman when my husband accepted his first teaching job at MSU, I worked as an outreach counselor for the Gallatin County Family Planning Clinic for about six months and I was a substitute teacher. I then taught high school English and Psychology at the high school the next year before our move to Missoula and my entry into law school.**

**During law school, I did legal research for Professor Larry Elison and the Department of Public Instruction and I was a legal intern for the Missoula County Attorney's Office, and I was a teaching assistant in the Legal Writing Program.**

56. Please identify the nature and extent of any pro bono work that you have personally performed during the past five years.

**My pro-bono work has been primarily limited to the teaching and coaching that I have done at the UM Law School both with the ATLA Trial Team and the Advanced Trial Advocacy Program. The hours that are put in with the Trial Team are completely uncompensated. Although I receive a nominal fee from the Law School for directing the Advanced Trial Advocacy Program, it comes nowhere close to compensating me for the time I put in. Because I do not directly represent clients who require legal services, I have contributed to the Montana Justice Foundation each of the last several years.**

57. In the space provided, please explain how and why any event or person has influenced the way you view our system of justice.

**I was drawn to law school after spending a number of years as a high school teacher and counselor because I watched as dedicated lawyers attempted to try to change the law to meet the aspirations of our country by use of legal arguments, precedent, and creativity to apply precedent in new ways as opposed to simply calling for revolution in the streets. I graduated from college in the mid-sixties with no thought to being a lawyer, even though my father was one and it was expected that my baby brother would follow in his footsteps. As we all recall, the sixties was a time of significant social change and upheaval, and there were many attempts to change the world by violence. I was always uncomfortable with such a choice even though I believed then, and do now, that there are areas where change is needed. When I**

began to read about not only the legal struggle of the civil rights movement but also the changes that the lawyers were able to effect by their use of the law, I decided that a legal career was something I wanted to explore and that perhaps I could have an impact too.

Although my career did not have direct impact on the civil rights movement, or other human rights issues, I have found throughout my career that it is important to focus on crime victims and to hold those responsible for violations accountable for their actions. At the same time, my position has enabled me to ensure that those responsible for enforcing the law follow it, or if it is clear that they have not, the person is simply not charged. We simply cannot seek justice if the persons in charge of enforcing the law proceed with shortcuts.

58. In the space provided, explain the qualities which you believe to be most important in a good judge.

A good judge needs a special combination of both personal traits and legal skills. The personal skills needed are the highest ethical standards, an ability to treat everyone fairly, an ability to remain calm, an ability to make decisions, intelligence, diligence, basic organization skills, and a willingness to work hard to keep up with the day to day demands of the job and to learn areas of the law that the judge might not be familiar with. In addition, a good judge needs both self-confidence and humility so that the judge can control the courtroom, but the power given to the judge will not go to the judge's head. In short, these personal qualities amount to that so-called "judicial temperament". A good judge needs to be respectful of the parties who appear in his or her court and to let the lawyers do the lawyering. Although clearly a judge is more

than just a simple referee calling balls and strikes, the judge cannot “try the case” for one of the lawyers. A good judge needs to have impartiality so that the parties and the lawyers who appear in court do not think that the deck is stacked against them.

Finally, a good judge must be mindful not to waste the time of the parties, the jurors, the witnesses, and the lawyers who are summoned to court for a hearing or trial.

With respect to the legal skills, a good judge needs to know how to analyze cases, how to write and speak clearly, what the Rules of Evidence, the Rules of Civil and Criminal Procedure, and the applicable statutes say and how those rules and the statutes should be applied. A good judge needs to be current in the law. A good judge needs to know how to research when a question is presented so that the appropriate law and precedent can be applied.

59. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

The law serves as the primary glue that holds society together. We need only look to the events of other countries to see the tragedies that can befall a country if there is no law in effect. The law has had a stabilizing effect on our society, yet has allowed our society to evolve in an orderly fashion. The law is reflective of society's norms, yet at times, can also be reflective of society's aspirations and good intentions. The reason that the law has served this dual function in our history is that our Courts have struck a proper balance between precedent and flexibility. Precedent provides for stability, flexibility allows what we consider appropriate to evolve. Precedent must be primary, but never in such a manner that the law never changes. After all, we are no longer citizens of the United States that was composed of 13 states and it was 1789.

A body of precedent needs to be established so that litigants know what the rules are. Nothing is more difficult to explain to an individual trying to follow the law if the law keeps changing. Such a condition invites disrespect for the law and an unwillingness to follow it. However, at the same time, societies evolve and change, and new challenges occur. No one could argue now that a black person should be considered only a partial person, that women should not be able to vote or own property or attempt any profession desired, or that separate but equal is ok. Equally, not so many years ago, there were no computers, no satellites, no instant messaging, no Googling to retrieve information in an instant. So, the law must continue to have that flexibility that accounts for such changes and allows society's aspirations for a better world to occur.

In general, if a significant deviation from precedent is to occur, the change should come from the Supreme Court of the State or Country.

60. In the space provided, state the reasons why you are seeking judicial office. Please indicate whether the judicial salary will be an increase or decrease over in your current gross income.

I am seeking this position because I believe that I am especially well qualified to be a district judge because of my experience, my intellect, my sense of fair play, my compassion, my temperament, my willingness and ability to work hard and my common sense. I have wanted to be a judge for almost twenty years, and believe that this position is one more way that I could serve the citizens of Missoula and Mineral Counties.

I am thoroughly familiar with the courtroom, its procedures, and the rules of evidence. I have substantial trial experience, and have probably tried more cases than any other candidate for this position, and maybe more than many of them combined. That experience has allowed me to master and understand not only the mechanics of trial practice, but also the nuances. With that experience, I would not need as much time to work into the position, but in many ways could hit the ground running. Although this experience has been primarily in the criminal area, the rules of evidence are the same in civil cases, and the experience that I have had with my own civil cases as well as my work with the Advanced Trial Advocacy Program at the Law School which focuses on civil litigation, and the ATLA Trial

Competition Team allows me to feel quite comfortable with being able to handle civil litigation as well.

A judge has to be able to make difficult decisions and be willing to take the heat when litigants are unhappy. As a prosecutor, I am used to making hard decisions, sometimes unpopular ones, exercising compassion where appropriate, holding individual responsible for their actions, and treating individuals fairly. I like an intellectual challenge, and would look forward to learning more about the law in the areas in which I have not had much experience. I am aware of my limitations in certain areas of the law, and the need to seek assistance and help in those areas that are not my specialties. I learned from my father, a lawyer with over 50-years of practice under his belt, the value of hard work. I would expect to emulate his example and spend a substantial period of time if I should be chosen for this position reading in those areas and talking to lawyers who specialize in those areas about what I should be reading and learning.

I am even tempered, and do not tend to get rattled when under pressure. I am well respected by lawyers in this community, and I believe that they all believe that I have always pursued my profession with integrity and the highest ethical standards. I do not hold grudges, and I am quite confident that most if not all attorneys against whom I have litigated would feel comfortable with me deciding future cases in which they appear.

The judicial salary would be an increase for me from my current salary as the Chief Deputy County Attorney.

61. What items or events in your career have distinguish you or of which you are most proud.

I have largely had a legal career of “firsts” and I would very much like the opportunity to be the first District Court Judge for the Fourth Judicial District. Those firsts began in law school when I was chosen the first woman selected as the outstanding law student and the first woman selected as the outstanding Phi Delta Phi graduate for both the UM Law School and the Northwest Region. I was also the first woman prosecutor for Missoula County prosecuting criminal cases and the first woman named as a special prosecutor for the State of Montana and currently, the first woman in the Missoula County Attorneys Office to serve as Chief Deputy. I was also the first woman chosen as an “Outstanding Lawyer” for the Western Montana Bar Association. I was the first prosecutor to be asked to participate in the Advanced Trial Advocacy Program at the University of Montana School of Law and the first woman to direct that program. However the “first” that I am most proud of is my election to fellowship in the American College of Trial Lawyers in Montana. At the time of my election, I had not heard of this organization, but I came to learn that membership is by invitation only, after a thorough investigation of the candidate’s legal ability, reputation in the community among colleagues, opponents and judges and is limited to those lawyers with the highest ethical standards and to no more than 1% of the active practicing

lawyers in any given state or Canadian province. In Montana, there are only 42 Fellows, in Missoula, only seven. Now there are two additional female fellows, but it was such an honor to be the first. I have also since been the first woman to serve as State Chair of the Montana Fellows.

Finally, outside of the legal community I was the first woman to serve as President of the Kiwanis Club of Missoula.

62. State any pertinent information reflecting positively or adversely on you which you believe should be disclosed to the Judicial Nomination Commission.

I am unaware of any adverse pertinent information that should be disclosed to the Judicial Nomination Commission. I believe I have discussed elsewhere the pertinent positive information.

63. Is there any comment you would like to make that might differentiate you from other applicants or that are unique to you that would make you the best judicial candidate?

I, of course, do not know all of the candidates who are applying for this position. However, I believe that of those I do know, I am distinguished from them by my extensive and recent trial experience and by all of the teaching that I have done both at the Law School and through many CLE programs. To the best of my knowledge, I am the only candidate that has prepared two significant outlines on Montana Law topics that is widely used in the State. To the best of my knowledge, I am the only candidate that has participated in the Advanced Trial Advocacy Program at the University of Montana for many years. This program has been described as attracting the best trial lawyers in the state. To the best of my knowledge, I am the only candidate that has been asked repeatedly to present at CLE programs at the national level and for federal agencies. I am confident that I am the only candidate that is a Fellow of the American College of Trial Lawyers.

#### J. CERTIFICATE OF APPLICANT



I understand the submission of this application expresses my willingness to accept appointment to the Judiciary of the State of Montana, if tendered by the Governor of the Montana Supreme Court, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Canons of Judicial Ethics, if appointed.

**March 15, 2006**

(Date)

\_\_\_\_\_  
(Signature of Applicant)

Application form approved 7/10/93  
Revised 12/27/94

**Writing Sample as requested in Question 51. This is a brief I recently prepared in response to a Motion to Suppress. I deleted portions of the Statement of Facts to come within the 10-page requirement.**

Karen S. Townsend  
Deputy County Attorney  
FRED VAN VALKENBURG  
Missoula County Attorney  
Missoula County Courthouse  
Missoula, Montana 59802  
(406) 721-5700, Ext. 246  
ATTORNEYS FOR PLAINTIFF

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

STATE OF MONTANA,

\*

Plaintiff,

\*

Dept. No. 3  
Cause No. DC 05-511

-VS-

**STATE'S MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTION TO SUPPRESS**

PERRY CARL WILLINGHAM,

\*

Defendant.

\*

\* \* \* \* \*

**INTRODUCTION**

Defendant has moved this Court to suppress the evidence secured in this case alleging that an illegal search of the hotel room at Ruby's lead to the stop of the car in which the Defendant and his co-defendant were riding, and that later, the consent to search the hotel room given by the co-defendant was invalid since she was not a registered occupant of the room.

The State asserts that there was no illegal search of the hotel room by law enforcement, but that entry of the room was made by hotel management acting on their own authority. The State further asserts that the co-defendant had lawful authority to consent to a search of the motel room. Thus, the Motion to Suppress should be denied.

**STATEMENT OF FACTS**

On October 18, 2005, Missoula City Police Officer Ed McLean was advised by personnel at Ruby's Inn that a maid had found materials while cleaning the room that appeared to the maid that the occupants of the room had been manufacturing phony checks for possible passage at local businesses as well as phony identification cards and perhaps engaging in drug activity as well. McLean spoke to general manager Jason Winterrowd and the maid, Cadee Gordon. Gordon advised that she had gone to the room at approximately 10:00 AM as part of her routine duties. She planned to replace the used towels, replace the pillowcases and make the bed. She entered room 222 and saw at least three photocopies of driver's licenses belonging to at least three different people. She saw a computer, printer and laminating machine within the room as well. She located a microwave within the bathroom and it

did not belong to the motel. Winterrowd secured the motel room door by changing the electronic key access. Winterrowd gave McLean a copy of a check used by the suspect to pay for the room. It was in the name of Sherman Dunahee and used a Kalispell address. Winterrowd said that the male had given one check for the first night and then when he wanted to stay another night, provided a second check. He described the male as being in his late 40's with a thick dark mustache and hair combed straight back. He said that he left the fake id's in the room, but had noticed when he looked that one id was in the name of Sherman Dunahee. He also said that he saw what appeared to be drug activity in the sink in the room. He also said that among the laminated id's there was at least one female. He promised to contact 911 if the suspect returned. McLean never entered the room. By the time of McLean's arrival at Ruby's, Winterrowd had already taken control of the motel room by changing the security key so that the renters could not access the room.

Detective Stepper began an immediate investigation into the check and determined that the check was fraudulent. He said that the routing number on the check was false and that the bank printed on the check did not have an account in Dunahee's name. Detective Stepper has specifically advised Deputy County Attorney Karen Townsend of the following:

Myself and Agent Downs never entered the room prior to Willingham's arrest. We met with the manager and verified that the account information on the check and the name used to register the room were fictitious. Entry was made to the room after Brock Davis gave us consent, and after Willingham denied ownership of the property inside of the room. In addition Willingham claimed that he was staying at a motel in the Kalispell area and that he had never been to, or ever stayed at this particular motel. As far as the vehicle is concerned it was in the care of Brock Davis, she claimed ownership and I was able to verify this claim through the Title holder."

Shortly after midnight on October 19<sup>th</sup>, Missoula police officers learned from the security officer at Ruby's, Harry Shunk, that the two individuals who had rented the room at Ruby's had left the room in a green car with Oregon license plates. Police Officers followed the car in I-90 until it stopped at Muralt's.

Officer Ludemann ordered the occupants out of the car. The driver was identified as Rose Brock-Davis and the male passenger as Perry Carl Willingham.

Brock-Davis was advised of her rights and she gave consent to search the car. Officers Ludemann and Tolson conducted a search of the trunk as Brock-Davis advised that Willingham had been cooking meth and that in the trunk was a portable meth lab.

### **LEGAL ARGUMENT**

#### **NO LAW ENFORCEMENT OFFICER MADE AN UNLAWFUL ENTRY OR UNLAWFUL SEARCH OF THE MOTEL ROOM AT RUBY'S AND THE ENTRY BY HOTEL PERSONNEL DOES NOT REQUIRE SUPPRESSION OF THE EVIDENCE**

Although it is unquestionably black letter law that searches without warrants are inherently unreasonable, and that law enforcement officers are generally required to obtain a search warrant prior to entry into an area controlled by an individual, there are certain exceptions to the warrant requirement, and the warrant requirement only applies to officers, not private persons. In this case, entry into the motel room at Ruby's was not made by law enforcement officers or at the request of law enforcement officers, but rather by the cleaning employees and general manager of Ruby's. The entry by the maid was part of her routine duties of cleaning the room and replacing linen. She was suspicious, illegal activity and reported her findings to the hotel general manager. The manager then came to the room and saw for himself what the maid had seen and took two actions, one he changed the security key card thus depriving the defendant and his girl friend access to the room, and then called the police to report what he found. Officer McLean responded and spoke to both the manager and the maid, and took the check used to pay for the second night's stay. Although Defendant speculates that the manager's entry was made at the request of law enforcement, and that Officer McLean entered the room, there is no evidence that Officer McLean ever entered the motel room, or that the manager's entry was made at Officer McLean's request. In fact, in a recent e-mail to counsel for the State, Officer McLean specifically denies any entry to the room, states that the information contained in his report came solely

from the observations of the motel personnel, and advises that the room had already been secured prior to any contact with the police. Thus it is clear that the hotel personnel did not act as agents of the police.

The motel manager's actions were private actions not subject to the requirement of a warrant, and his observations and subsequent report of those observations to Officer McLean are not subject to the exclusionary rule. This principle was articulated in 1985 by the Montana Supreme Court when Montana finally joined the rest of the jurisdictions in the country when it overruled a long line of cases which had applied the exclusionary rule to citizen searches. In State v. Long, 216 Mont. 65, 700 P.2d 153 (1985), the Court held that invasion of privacy by another citizen does not constitute a violation of the constitution which requires application of the exclusionary rule. In the Long case a landlord trespassed into his tenant's residence and discovered a large marijuana grow operation. He reported his find to the local sheriff who obtained a search warrant for the plants. Former Justice Morrison writing for the majority said:

Montana is one of a small minority of states to have an express provision for privacy in its Constitution. No other state has followed Montana's lead in interpreting the privacy protections of a state constitution to be applicable to acts of private persons.

Long at 216 Mont. 69.

Since the Defendant only speculates that officers entered the motel room, and the evidence is that no such entry was made, the subsequent stop of the vehicle driven by the co-defendant and containing the Defendant was perfectly appropriate. The reports are perfectly clear that information of specific criminal activity was taking place in the motel room and the description of the activity, including observations of attempts to produce identification and driver's license and potential illegal drug activity was first seen by the maid and later by the manager. That information was specifically communicated to Officer McLean by both the maid and the manager. The manager was asked to contact 911 if the parties reappeared at the motel, and such contact was made by the night security manager who provided a specific description of the car in which they were driving and the direction of

travel. All this information was in the hands of the police prior to the stop of the car and prior to any entry into the motel room. No illegal search took place and since no illegal search took place, but stop was justified as explained below.

### **OFFICERS HAD PARTICULARIZED SUSPICION THAT JUSTIFIED THE STOP OF THE CAR IN WHICH THE DEFENDANT AND HIS CO-DEFENDANT WERE RIDING**

In 1968 in the companion cases of Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York, 392 U.S. 40 (1968), the United States Supreme Court laid out the stop and frisk doctrine, another exception to the warrant requirement of the Fourth Amendment. The doctrine was an attempt to strike a balance between the necessity for some flexibility in police behavior in the investigation and prevention of crime, and the rights of citizens to be free from unreasonable governmental intrusion. The Court rejected the notion that the limited scope of a stop and frisk took the question outside the protection of the Fourth Amendment, but did recognize that because the intrusion was more limited in scope than a complete arrest and full-blown search, less substantial "probable cause" was necessary to justify the actions of the police. The standard articulated by the Terry Court was variously labeled "suspicion", "reasonable suspicion" or "reason to believe." The Court stated that the officer is entitled to act "only on the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Further, the officer must be able to articulate specific facts justifying both the stop and the frisk since different governmental interests were involved in "stops" and "frisks." The governmental interest at issue in a "stop" was the prevention and detection of crime. The governmental interest at issue in a "frisk" is the protection of the officer making the "stop" from physical harm from an armed person. In U.S. v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581 (1989), the United States Supreme Court held that the articulable suspicion for a Terry stop is based upon a totality of the circumstances and no rigid categorization of circumstances is required. Terry stops must be of limited duration and extent. In 1983 in Florida v. Royer, 460 U.S. 491 (1983), the Court approved the initial stop of the defendant based on the drug

courier profile, but when the stop moved from the initial asking for identification and informing him of their suspicion, to the retention of the defendant's plane ticket and driver's license and taking him to an office, it became "more intrusive than necessary to effectuate an investigative detention." The principles of the Terry stop were extended to stops of vehicles by the United States Supreme Court in United States v. Cortez, 449 U.S. 411 (1981) and by the Montana Supreme Court in State v. Gopher, 194 Mont. 227, 633 P.2d 1195 (1981).

The test in Montana that applies both to stops of persons and cars and that has been articulated over and over is the "totality of the circumstances test" and the necessity for the Court to find "objective data from which an experienced officer could conclude that the suspect was or has been engaged in wrongdoing or that the person is a witness to criminal activity." See State v. Broken Rope, 278 Mont. 427, 925 P.2d 1157 (1996). Clearly the "objective data" in this case under the totality of the circumstances test justify the stop of the car. Officers had specific information from credible sources that specific illegal activity had taken place in the motel room and that the occupants of the car had been the occupants of the motel room. The police were given a specific description of the car, a green Chevrolet Lumina with Oregon plate # VRZ361, and a specific direction of travel, east on Interstate 90. The car was located only a couple of miles away from the motel and followed to Muralt's at the intersection of Interstate 90 and US Highway 93 N. Such information more than satisfies the requirement of the stop.

#### **ROSE BROCK-DAVIS HAD AUTHORITY TO CONSENT TO A SEARCH OF THE MOTEL ROOM**

If a search is conducted pursuant to an individual's consent, any evidence found in the search can be used against the defendant in any criminal proceeding. In 1973, the United States Supreme Court decided the Schneekloth v. Bustamonte, 412 U.S. 218 (1973), case and discussed the quality of consent required to meet Fourth Amendment standards. The key principle is that the consent must be

"voluntary". Voluntariness is to be judged by the "totality of the circumstances" with no one factor being determinative. However, for consent to be demonstrated, it must be shown that it was unequivocal, specific, intelligently given and uncontaminated by duress or coercion.

Consent can be either first-party consent or third-party consent. In first-party consent cases the courts will look to the conduct of the police and how they obtained the consent. There is no requirement that the person be advised that he has the right to refuse the request. In third-party consent cases, the courts will also examine whether or not the person giving consent has the authority to consent to the search of the specific area. The court will look to see if the person giving consent possessed common authority over, or other sufficient relationship to, the premises or effects sought to be inspected. This authority rests on the mutual use of the property by persons who generally have joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit an inspection in his own right, and that the others have assumed the risk that one of their number might permit the common area to be searched. In 1990, the United States Supreme Court in the case of Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793 (1990), held that a former co-tenant had no authority to consent to a search of the premises. The person giving consent had told the officers that the apartment was "ours", and that she had clothes and furniture there, unlocked the door with her key and gave the officers permission to enter. The Court concluded that since she had moved out one month previously, she no longer had common authority over the apartment. The Court remanded, however, the issue of whether the police reasonably believed that she had authority to consent to the entry into the apartment, because if so, the search would have been valid. Montana has rejected the Illinois v. Rodriguez rationale of apparent authority in State v. McLees, 2000 MT 6.

Although Defendant has framed this case as a third-party consent case, it is actually both a first party and third party consent case. The allegation now of the defendant is that since Ms Brock-Davis was not the registered guest of room 222 at Ruby's, then she could not give a valid consent to the



search of that room. That allegation flies in the face of the statement made by the Defendant after the car was stopped at Muralt's.

Room 222 at Ruby's was registered to a Sherman Dunahee, neither the Defendant nor Ms Brock-Davis. Dunahee was a phony identity being used by Willingham to rent the motel room. The Defendant further used a forged check to pay for the room on an account that supposedly belonged to Dunahee. There is no doubt that Ms Brock-Davis was a guest in the motel room. Even Defendant does not claim that she was not a guest in that room, in fact he told the officers that night that she was the registered guest in the room. His claim now in an attempt to void her consent is that she was not the party on the registration form. Although true, neither was he and both had in fact been in that room. Brock-Davis told the officers after being advised of her rights that she had been staying in that room with the Defendant and that some of her personal property (a computer and clothing) was in that room. The Defendant himself told Detective Stepper that he had not been staying in that room that the room belonged to Brock-Davis, was paid for and rented by her, that he was staying in room 107 of the Aero Inn in Kalispell, and further that the detective could "search the room, I don't care." Therefore the officers had consent from the Defendant to search the room and further the officers had reason to believe that Ms Brock-Davis could consent to the search. As is required by State v. McLees, supra, there were sufficient facts to show "mutual use of the property" or "joint access and control." Her authority to consent was clear from the Defendant's own mouth. In fact, he claimed no access to the room, and therefore has no expectation of privacy in that place. Under the voluntariness test of Schneckloth v. Bustamonte and applying the "totality of the circumstances" test, the officer could easily conclude and this Court should conclude that the Defendant had also consented to the search.

Defendant attempts to impose an "exigent circumstances" requirement for the search of the room pursuant to consent. Although such a requirement is sometimes imposed when another exception to the warrant requirement is raised to justify a search, no such requirement has ever been imposed by the

Montana Supreme Court under the consent exception to the warrant requirement. The cases cited by Defendant are pure exigent circumstances cases, not cases in which another exception to the warrant requirement is used.

### **CONCLUSION**

For the reasons outlined above, the State of Montana asks this Court to deny Defendant's Motion to Suppress. The State of Montana moves this Court for an evidentiary hearing on this issue. The State estimates that the hearing will take two hours as the State must present five (5) witnesses.

Dated this 10<sup>th</sup> day of March, 2006.

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Karen S. Townsend  
Deputy County Attorney